BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of:	)	
	)	
Leased Commercial Access	)	
	)	
Development of Competition and Diversity	)	MB Docket 07-42
Video Programming Distribution and Carriage	)	FCC 18-80
	)	
Modernization of Media Regulation Initiative	)	MB Docket 17-105

To: The Commission

Reply Comments of Leased Access Programmers Association

These reply comments are being filed by Duane J. Polich, in his role as Vice President of the Leased Access Programmers Association, a national trade group dedicated to the promotion of the use of commercial leased access in a manner intended by Congress.

In these proceeding LAPA has filed comments asking the Commission not to vacate the entire order of the 2008 Commercial Leased Access proceeding which has been stayed by the Sixth Circuit Court of Appeals, but rather pass or enact those parts of the order, which did not require OMB approval or raised concern with the Court of Appeals and review and fix the rest. LAPA noted, it would be easier and more cost effective to fix the problems with the 2008 proceeding than to toss it out and start fresh. A lot of effort, manpower, and work went into the 2008 proceeding which was designed to fix some of the issues which faced potential leased access users to fully exercise their right to the opportunities and benefits of the 1984 Cable Act (and as revised) which established commercial leased access. The issues and concerns that lead the Commission back then to call for and pass this proceeding in 2008 remain true today as back then. In fact, leased access users and potential users have been in a limbo for 10 years since the 2008 proceeding was stayed.

Continuing to operate under the rules in effect before then and allowing cable operators to continue to throw up roadblocks has contributed to the decline of the usage of leased commercial access by independent video programmers , which the proceeding of 2008 was intended to prevent. Many of the leased access proponents back then are no longer around, including Media Access Project, Arnold Schwartzman, Community Broadcasters Association, United Church of Christ, etc. It would be a travesty and a disservice to the American public to continue on the current path by establishing more roadblocks and obstacles to the use of commercial leased access as the cable system operators are inclined to do.

Specifically, we address the comments of the NCTA and the ACA in this proceeding.

NCTA in its comments claims *"that the circumstances that caused Congress to require a leased option for unaffiliated cable programmers no longer exist. As noted, the commercial leased access provisions and purpose was explicitly set forth in the statute "to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information services are made available to the public from cable systems in a manner consistent with the growth and development of cable systems".*

NCTA now claims that *"in the years that followed, the video marketplace has been radically transformed in a manner that makes leased access an anachronism. In particular, the Internet has evolved into a readily available and virtually unlimited platform for the distribution of free and subscription-based video services. NCTA claims that to due to development of competition and cable operators and other multichannel video programming distributors, consumers now have a competitive choice of multiple delivery systems offering more programming options of more diverse types from more diverse sources than was imaginable a quarter century ago".*

Well, this is all fine and good but the internet is not cable. The viewing experience with the internet is not as robust and reliable and with ease as the viewing experience with cable. With cable, you can turn on the TV, change the channel with a remote, see what is playing and go to another channel in short order. The picture is usually clear with no lag or delay. There is no buffering with cable. It is like watching OTA television which gave birth to cable. There is no need to have a broadband service capable of the speeds which would be required to watch video programming on a consistent basis. As can be said if the Internet is such a great alternative source for programming then why have cable? If cable still has a purpose, then commercial leased access has a purpose. Other methods of distribution and MVPD's are not available to your average video programmers. Satellite distribution is cost prohibitive and not easily obtainable. Other MVPD's have other obstacles to overcome in order to use them. Very few of them makes sense for distribution of locally or regionally focused programming. In reality with many cable systems being owned by a select few of MVPD's such as Comcast (which owns NBC), Charter which bought out Time-Warner, Altice, Cox and MVPD's like AT&T, Verizon, Dish and Frontier controlling the country through continuous mergers and buyouts, they have an enormous clout to control and shape the viewing choices of the public. The comments of AIM (American Independent Media) in this proceeding clearly point this out. This is clearly what the intent of Congress in establishing the leased access rules was designed to prevent.

NCTA goes on to claim, that *"today, to the extent leased access affects video competition at all, its impact is adverse. Its burdens are imposed solely on cable operators and on none of the cable' s robust competitors. This reality has obvious implications for the continuing need for, and constitutionality of, the statutory requirement. And while the Commission cannot repeal the statute, it should take steps, in revisiting its rules, to minimize the burdens that these unnecessary constraints on speech impose on cable operators"* .

So what is missing here? What adverse impact? What burden? How are they being harmed? How have their constitutional rights been violated? If so, how? How has there

right to free speech been constrained? Have they provided any examples of actual instances? Have they provided any documentation that a cable system operator has been adversely affected, i/e lost money, by providing leased access ?. Either I have overlooked them or they seem to be missing.

The Cable Act's purpose clearly addresses this issue ("in a manner consistent with the growth and development of cable systems"). Hmm, let me see, "I give you money to carry my programming, but it is too much of a burden on you, because you rather make money by charging money to programmers you would rather carry, many who charge you money to carry them, but that's okay, cause you can just charge (jack up your fees with profit) to your subscribers to cover those fees" Oh, no wonder there are cord cutters and the cable business continues to decline and most likely all programming distribution will end up on the internet or OTA TV and cable will go bye-bye.. Oh, poor cable operators, so misunderstood. Perhaps it would be better to let you have a monopoly, use the public rights of ways for your equipment, cable, and fiber , let you choose, limit or dictate what we watch or have access to and let you run your business any way you want. What was Congress thinking!

NCTA goes on to say in its comments *"The Further Notice of Proposed Rulemaking takes the right steps in this direction. It proposes to vacate the order and rule amendments that were adopted a decade ago, but never took effect, because both the United States Court of Appeals for the Sixth Circuit and the Office of Management and Budget found them to be flawed from the outset. In any event, the factual record assembled in 2008 provides no meaningful basis for assessing whether any such amendments are beneficial or reasonable in 2018. Continuing to argue about the legality of the never implemented 2008 rules would be a useless exercise, and the Commission is right to propose pulling the plug on them".*

Excuse me? The concerns, circumstances and the record of the proceeding that led the Commission to adopt the rules back in 2008 are true today as it was back then. The

Commission was trying to follow the intent and wishes of Congress and tried to encourage the use of commercial leased access by revising its rules and policies to eliminate roadblocks, obstacles and red tape for independent video programmers in exercising their right to use commercial leased access as a source of distribution of diverse voices which solidifies our democracy. The obstacles to such had been in place due to the policies, procedures, and practices of the Commission and the cable system operators.

The reasons, need, concerns, and methods of the Order weren't flawed, but perhaps the manner in which they were implemented was. It is far cheaper to fix a car that needs minor repairs than to run out and buy a new one. In fact, the argument that the NCTA used to win a "stay" with the Sixth Circuit Court of Appeals was flawed in its own right. ("That cable systems would be irreparably harmed" if they actually had to use the number of channels that they were required by law to set aside for use by leased access programmers") Again cable has provided no basis or evidence to back this up.

NCTA continues *"We welcome the Commission's specific request for comments on whether and to what extent the leased access rules implicate First Amendment interests. Forcing cable operators-whose constitutionally-protected exercise of editorial discretion was recognized more than 30 years ago by the Supreme Court- to carry programming that they would otherwise choose not to carry raises serious First Amendment problems".*

It is not the Commission's place, obligation, authority or business to address the First Amendment concerns and any potential violation of, raised by the cable industry. These matters have already been addressed by the courts and they have upheld the leased access provisions enacted by Congress. Only the courts and Congress can change these provisions. In the meantime, the Commission is obligated to carry out the directions given to them by Congress.

The NCTA would also like to be able to respond only to "bona fide" requests and to charge an initial application fee to provide the requested information. There is certain

information that is needed by a leased access programmer in order to determine if they would want to make formal application for time on a leased access channel. Much of this information is standard and can easily be posted on a website, especially by the larger companies and/or can be put into pdf documents and e-mailed to a prospective leased access programmer. Rate information can be calculated using a standard spreadsheet. All cable companies should have this information on file and a policy in place regarding leased access as a matter of doing business, just as they need to have necessary permits, policies, procedures, etc. Only when they have enough information to proceed, should they have to make a formal application. Since making a "bona fide" request is only a matter of wording and asking for certain information does it really matter?

By having the information on a website or easily e-mailed out should weed out a number of the "tire kickers". The Commission has soundly rejected the notion of an application fee to obtain leased access information in the past and should soundly reject this request.

NCTA has failed to provide any proof that cable system operators have been overburden by responding to leased access requests nor unduly harmed. Again the model is that the leased access users pay's the cable company to lease time on the system. What business charges for information for doing business with them. Do they charge potential subscribers for info on rates, availability, what programming is available? I would think not. Do they charge potential advertisers of commercial inserts for information on availabilities, rates, contracts etc, I would think not? So why charge leased access for basically the same information. There is absolutely no basis or need for this. This is called a marketing expense and is a normal budget item and cost of doing business.

The NCTA would like to be able to charge deposits to potential leased access users. While Many leased access contracts already may call for a deposit. It should be noted, do they impose deposits on its other users and for advertising insert clients. In no case, should the cable company required a deposit nor need financial statements or credit applications when the leased access time is paid for in advance, usually on a monthly basis.

NCTA would like additional response time to requests. It is this issue that led the Commission to adopt its customer service standards. In the past, a number of cable systems were very slow or unresponsive to requests leading the Commission to adopt more stricter standards. This, in turn, led to objections from the OMB. In any event, there is a need to reduce the response time to a reasonable period and in no case more than 15 days. As noted the cable system should already have much of the information on hand and easily e-mailed. We would understand that there may be circumstances that additional time may be needed to gather certain information, but that a reasonable explanation of the delay should be sent within that time period.

The Commission should further reject any requests for the elimination or substantial changes to the part-time leased access requirements. As has previously been noted, many programmers are small and have a limited amount of programming to present nor need or can afford a full-time channel. To eliminate part-time leased access would fly in the face of what Congress intended when they established such rules. Again the claims of a burden to cable operators to provide such are speculative and unsupported.

The comments of the ACA are similar to those of the NCTA and thus we do not need to address them separately.

In the end, cable systems are granted franchises and in many cases monopolies to provide cable TV services to the various cities, towns or other political subdivisions. The cable companies use the public right of ways for their cable, fiber, equipment, etc. The franchise carries certain service standards and obligations to the residents and subscribers.
Leased Commercial Access was established by Congress to address various concerns about media control and to ensure diverse sources of programming. While there have been substantial changes in technology allowing increased sources of programming, they should be considered supplemental and not as a substitute for distribution methods. They should not relieve cable of its leased access obligations. Cable use is still substantial. The cable

use experience is still superior. While the Internet/Broadband may sometime replace cable entirely, cable remains relevant and therefore leased access should remain relevant.

It would be nice if the cable system operators embraced leased access and encourage its use in a manner that is beneficial to its subscribers. With the additional usage, the income stream would go up and reduce the alleged burdens upon cable systems operators and help make it a win-win situation for all parties involved.

The cable system operators should follow certain customer service standards, so that prospective leased access programmers can obtain the necessary information needed to be part of its business plan and decision-making process as not to be a burden on them as well. Remember it is the programmer that will be paying the cable company for the time and not the other way around. The programmer will be carrying the burden of making a profit or not.

The need, concerns, and circumstances that led the Commission to adopt its order in 2008 remain true today as back then. A lot of effort and thought went into this proceeding and there is no need to vacate the entire order. It is easier to fix the parts that need fixing than to start from scratch.

The Commission should adopt policies and procedures which encourages and promotes the usage of commercial leased access as intended by Congress;

There should be fair customer service requirements for the cable companies to follow with reasonable expectations;

There should be clear policies with regards to signal delivery, geographic distribution, insurance needs, contracts, equipment usage, assorted fees, etc.;

There should be fair rates that cable systems are allowed to charge, that can be easily calculated with a standard spreadsheet;

There should be a reasonable accommodation for future technology ;

The Commission should expand this proceeding to further gather ideas, input, suggestions, recommendations to fix the broken parts of the 2008 leased access order and leased access, in general, to make it more equitable for both parties. The Commission should encourage the representatives of the cable industry and the leased access programmers to get together and come up with a plan to make leased access work as intended and desired by Congress.

Respectfully Submitted,

Duane Polich
Vice-President
Leased Access Programmers Association

17317 Woodcrest Drive N.E.
Bothell, WA 98011